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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE,

Petitioners,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY AND BRIEF IN SUPPORT THEREOF.

J. SMITH HAYS,
WILLIAM O. HAYS,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

ANDREW JACKSON TRIMBLE (JACK TRIMBLE), JOE TRIMBLE, AN INFANT BY HIS NEXT FRIEND, JACK TRIMBLE,

Petitioners,

vs.

ZACK JUSTICE AND K. L. ARNOLD, EXECUTORS, ZACK JUSTICE AND K. L. ARNOLD, TRUSTEES, ZACK JUSTICE AND K. L. ARNOLD, STATUTORY GUARDIANS OF JOE TRIMBLE, INFANT APPELLANT, MARY MARGARET TRIMBLE, MAY TRIMBLE, AND JUNE TRIMBLE, INFANTS, INDIVIDUALLY AND BY THEIR STATUTORY GUARDIANS, ZACK JUSTICE AND K. L. ARNOLD, BETTY TRIMBLE, JAMES TRIMBLE, PEM HATCHER, WALTER HATCHER, BRUCE MILLER HATCHER, BETTY HATCHER WEDDLE, JUNE POLLEY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Andrew Jackson Trimble (sued in this case as Jack Trimble) and Joe Trimble (an infant over

fourteen years of age, by his next friend, Jack Trimble), state they are citizens and residents of Pike County, Kentucky; that James Hatcher, a citizen and resident of Pikeville, Pike County, Kentucky, departed this life September 29, 1939, having made and published his last Will, with codicils thereto; that James Hatcher's Will, with codicils (R. p. 16) was on October 2, 1939, filed in the Pike County Court, Kentucky, proven and probated by proper orders duly entered; that by the Will and orders duly entered Zack Justice and K. L. Arnold were appointed (R. p. 17), executed bond and qualified as executors of James Hatcher's estate; that by his will Zack Justice and K. L. Arnold were appointed Trustees of his estate, (R. p. 20) and by proper orders duly entered they executed bond and qualified as Trustees of James Hatcher's estate; that thereupon they became, have been since, and now are the duly appointed, qualified and acting executors and trustees of the estate of James Hatcher, deceased.

Petitioners state Zack Justice and K. L. Arnold were by proper orders of the Pike County Court, appointed, executed bond and qualified as provided by law, as statutory guardians for the infant petitioner, Joe Trimble, and the infant respondents, Mary Margaret Trimble, May Trimble and June Trimble; that they have been since and now are their duly appointed, qualified and acting statutory guardians; that Zack Justice and K. L. Arnold were appointed, executed bond and qualified as statutory guardians of Jack Trimble, Petitioner, and Betty Trimble, Respondent, who are each now twenty-one years of age.

Petitioners state by his Will James Hatcher conveyed to Zack Justice and K. L. Arnold, Trustees, all of his property of every kind owned at the time of his death (R. p. 20), to be held, managed and controlled for the use and benefit of the seven Trimble children and four Hatcher children (for life with remainder over): James Trimble, Jack Trimble,

Betty Trimble, Joe Trimble, Mary Margaret Trimble, May Trimble, and June Trimble, and Walter Hatcher, Jr., Betty Hatcher, Pem Hatcher and Bruce Miller Hatcher.

Gifts in Contemplation of Death.

Petitioners state James Hatcher, within two years before his death, made the following conveyances and gifts:

Gift to:	*Kind of Property:*	*Date of Gift:*	*Valuation:*
Jack and Joe Trimble,	Hotel property and Residence on Main Street in Pikeville, Kentucky,	Deed dated 10-6-38	$110,000.00
Betty Hatcher,	Vanover Apartments in Pikeville, Ky.,	Deed dated 10-6-38	5,000.00
Mary Margaret Trimble, May Trimble, June Trimble, and Betty Trimble,	Locust Court in Pikeville, Ky.,	Deed dated 10-6-38	35,200.00
Mary Margaret Trimble,	Cash (gift)	1-18-39	4,500.00
June Trimble,	Cash (gift)	1-18-39	4,500.00
May Trimble,	Cash (gift)	1-18-39	4,500.00
Betty Trimble,	Cash (gift)	1-18-39	4,500.00
June Polley,	Cash (gift)	2-10-39	4,300.00
Walter Hatcher, Betty Hatcher, Bruce Miller Hatcher and Pem Hatcher,	Caney Creek Farm, Pike County, Ky.,	Deed dated 1-17-38	676.00
		Total	$173,176.00

Treasury Department Assessment.

Petitioners state after the death of James Hatcher the United States Treasury Department, Internal Revenue Service, assessed and fixed the gross value of the estate of James Hatcher, deceased, for Federal Estate taxes to be $486,801.33, and the net estate for basic Federal Estate tax to be $352,931.29, and the net estate for Additional Federal Estate tax to be $412,931.29, and correctly computed the tax to be $61,036.60; that the executors paid on March 17, 1941, the Collector of Internal Revenue $14,981.10, leaving a deficiency of $46,055.50 (R. pp. 6, 94).

This assessment included in James Hatcher's estate for estate tax purposes the value of the gifts, made within two

years of his death, to Petitioners, Jack and Joe Trimble, in the sum of $110,000.00, and to the Respondents, money and property in all of the value of $63,176.00, making gifts, transfers, totalling $173,176.00.

Petitioners state a controversy arose between the Petitioners, the executors, the trustees, the devisees, and the respondents, about who should ultimately pay the Federal Estate taxes assessed against the estate of James Hatcher, deceased, whether the executors, trustees, or the Petitioners donees and Respondents donees, or the devisees beneficiaries of the Trust.

Suit in Pike Circuit Court.

Petitioners state the executors and trustees brought suit in the Pike Circuit Court, Kentucky, on July 18, 1942, for a declaration of rights between the parties and a settlement of the controversies under Kentucky Statutes, Carroll's Kentucky Civil Code of Practice, Baldwin's Revision 1938, Chapter IVa, Section 639a-1 through 639a-12, copy of the pertinent sections are filed herewith marked Exhibit 1.

Petitioners state Sections 639a-1 and 639a-2 provide any person interested under a deed, will or other instrument of writing or contract, written or oral, or whose rights are affected by statute, municipal ordinance or other government regulation; or who is concerned with any title to property, or who as fiduciary or beneficiary is interested in any estate, may apply for and secure a declaration of his rights or duties, even though no consequential or other relief be asked.

Petitioners state the executors, trustees, alleged in their suit the existence of the controversies between the parties, and took the position the executors of James Hatcher's estate by the payment of the Federal Estate taxes acquired the right to be reimbursed by the donees receiving property from James Hatcher within two years before his death;

that by such right they would be entitled to be reimbursed, $14,823.51, from the Petitioners as a proportionate share of the taxes to be paid by the executors and from others, donees of James Hatcher, before his death, various sums in proportion to the valuation of property given to them, and included in the assessment, in all amounting to $8,532.54 in taxes.

Federal Statutes Drawn in Issue.

Petitioners, Jack Trimble and Joe Trimble, by his guardian ad litem, answered separately (R. pp. 79, 96) denying the right of the executors, trustees, to recover any sum from them, or either of them, on account of the Federal Estate taxes when paid and satisfied by the Executors of James Hatcher's estate; that they affirmed they had no obligation to pay any of the Federal Estate taxes assessed against James Hatcher's estate, and all their liability would end when the taxes were paid by the executors; that it is so provided in effect by the provisions of the Act of Congress of February 10, 1939, c. 2, 53 Statutes 1, and Internal Revenue Department Regulations thereunder a copy of the pertinent sections filed herewith marked Exhibit 1.

Petitioners state under the pleadings there was also drawn in question the validity of the United States Revised Statutes, section 3467, as amended May 10, 1934, a copy of which is filed herewith marked Exhibit 2.

The Executors, Trustees, replied (R. p. 101), traversing the answers.

Provisions of James Hatcher's Will in Issue.

The Petitioners state they pled that under the Will of James Hatcher, deceased, it was provided the executors should pay out of James Hatcher's estate passing to them at his death all the Federal Estate taxes assessed against James Hatcher's estate; that there was no provision in

James Hatcher's will imposing any liability on Jack Trimble or Joe Trimble on account of the conveyance made to them by James Hatcher; that James Hatcher could not burden the absolute gifts made to the donees by any provision of his will which took effect only at the time of his death.

Petitioners state that under the pleadings and issues there was drawn in question the construction of the provisions of the Will of James Hatcher, as to payment of taxes, under the Congressional Acts and under Article 6 and 14th Amendment to United States Constitution.

The provisions of James Hatcher's will as to taxes are:

"ITEM 1. I direct the trustees hereinafter named to pay all my just debts out of the trust funds coming into their hands as soon after my death as practicable."

* * *

"I hereby further authorize and empower my trustees when necessary to borrow money and to mortgage my trust estate therefor for the sole purpose of paying any United States Government, County and State, including income and inheritance, taxes levied or assessed against my said estate left by me by this will."

* * *

"I hereby further authorize empower and direct that out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes on property deeded by me to the Trimble children and Hatcher children on Ivy and Caney Creeks, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property." * * *

"The trustees shall at least twice a year for the first ten year period; on the first day of January and on the first day of July each year; after having paid all ex-

penses, taxes, repairs and allowances as herein provided for;" • • •

"It is my express will and desire that when and if the income of my trust estate, after the expiration and settlement of the first trust of ten years, ever becomes insufficient to pay the taxes and the actual and necessary expenses and upkeep of the trust estate and the trustees for and during the second or thirty-five years trust period and at the same time leave a substantial and sufficient sum out of which to pay the devisees a fair and equitable distribution of the remaining proceeds after the payment of such taxes, expenses and upkeep of the trust fund and trust estate, that then and in that event, the beneficiaries, of whatever number they may be who are entitled to more than one-half of the benefits under and by virtue of my said last will and testament, may petition my trustee for a discontinuance of the second or thirty-five years trust relationship under my said will;" • • •

"3. In the last paragraph at the bottom of page 12 of my said will I have provided for the payment of taxes "on all of the property which I may own at the time of my death, whether the same be a part of this trust estate or not, also to pay all taxes on property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, etc. I hereby revoke the whole of said paragraph at the bottom of page 12 of my said will and in lieu thereof I make the following provisions in the next succeeding paragraph for the payment of taxes:

"I hereby further authorize, empower and direct that out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death, whether the same be part of this trust estate or not, also to pay all taxes on that property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, alone, when and if there are sufficient funds in my general trust fund with which to make such payment of said taxes. But when and if there is no money avail-

able out of my general trust fund for such payment, then I hereby authorize and empower my trustees to make such payment of such taxes for the Ivy and Caney tracts out of the separate trust estate or separate trust funds held by my trustees for my devisees as set forth on page 15 of my said will. If such payment is made out of my general trust fund such payment shall be charged against the devisee or devisees for who such payment was made. And if no funds are available out of either of my general trust fund or out of the separate trust funds held by my trustees for the devisees then such payment or any balance on said taxes shall be made by each devisee or devisees who owe such taxes." * * *

Answers of Respondents.

Petitioners state the adult respondents in the Pike Circuit Court, by their attorney and the infant Respondents, by their Guardian ad litem, answered (R. 74-103), and pled in substance, the executors upon payment of the Federal Estate taxes would acquire the right of contribution from the donees.

The Petitioners state they replied (R. 116), traversing the allegations contained in the answer of the adult and infant Respondents and the issues were completely joined in the Pike Circuit Court.

Petitioners state James Hatcher, by his deed of October 6, 1938, as alleged by the Executors, Trustees, conveyed to Jack and Joe Trimble the James Hatcher residence and Hotel property for life, with remainder over. Petitioners state by this conveyance James Hatcher divested himself of all title to that property, subject alone to such secondary liability for the payment of Federal Estate taxes as is by the Federal Statutes imposed, as security for the payment of the Estate taxes assessed against the estate of James Hatcher, passing at the time of his death, if there is no estate or not enough thereof passing to the executors to

pay the Federal Estate taxes. And in like manner James Hatcher gave to the other donees and devisees, respondents, as set forth herein above.

From these facts it results James Hatcher at the time of his death had no right or title in or to any of the gifts made by him and mentioned in this record. It follows James Hatcher had no power to impose any additional right or debt or even reduce the secondary liability imposed by the Federal Statutes, except as provided by the Federal Statute he might by his will direct how the burden of the Federal Estate tax should be borne by his devisees under his will but not as to donees.

Petitioners state the estate of James Hatcher passing at his death and by his will is amply able to pay the Federal Estate taxes; that the liability of the donees for the payment of James Hatcher's estate taxes becomes primary only in the event there is not sufficient estate in the hands of his executors to pay the Federal estate taxes; that upon the payment of the tax by the Executors their contingent secondary liability is extinguished.

Petitioners state the suit was submitted to the Pike Circuit Court and judgment was on the 2nd day of December, 1942, entered.

Judgment Pike Circuit Court.

Petitioners state the Pike Circuit Court adjudged the executors were required by the Federal Statute to pay the Federal Estate taxes and then erroneously adjudged (R. p. 122) that by such payment the executors acquired a right of reimbursement from the donee Petitioners jointly in the sum of $14,823.51; that by this judgment the court failed to recognize the rights of Petitioners and other donees under the Acts of Congress of February 10, 1939, c. 2, 53 Stat. 1, under Revised Statutes, Section 3467, as amended May

10, 1934, under Article 6 of the Constitution of the United States, and under the 14th Amendment, Section 1, Constitution of the United States, and by said decision and judgment Petitioners were deprived of their immunity to be free from the Federal Estate taxes imposed against James Hatcher's estate when paid by the Executors from the estate of James Hatcher in their hands; that Petitioners then contended they were immune from the Federal Estate taxes when so paid.

Petitioners state by said judgment of the Pike Circuit Court the executors were erroneously adjudged the right to adjust their accounts and keep $14,823.51 of Petitioners' money, which they have in their hands; that the Pike Circuit Court failed to recognize the State of Kentucky by the act of its officers, or any of them, had no power or authority to deprive Petitioners of their property without due process of law; that by this judgment Petitioners have been deprived of their property of the value of $14,823.51 in violation of the 14th Amendment, Section 1, Constitution of the United States of America.

Petitioners state by this judgment the Pike Circuit Court deprived petitioners of their rights under Article 6 of the United State Constitution because it failed to recognize the Federal Statute and decisions of the Supreme Court thereunder as the supreme law of the land.

Petitioners state they excepted to the judgment of the Pike Circuit Court and prayed an appeal to the Court of Appeals of Kentucky, which was granted as a matter of right, as provided by Section 639a-5 of the Kentucky Civil Code of Practice.

Appeal to Court of Appeals of Kentucky.

Petitioners state they prosecuted an appeal from the judgment of the Pike Circuit Court to the Court of Appeals of Kentucky; the highest court of law and equity

in the Commonwealth of Kentucky; that the case was briefed by Petitioners, and Respondents, on the issues, submitted and disposed of in the Court of Appeals by an opinion, Ex. 4, delivered by the whole court on February 16, 1943, reversing the judgment of the Pike Circuit Court in so far as that judgment adjudged the right of reimbursement to the executors from the Petitioners, donees, and other donees, Respondents herein; that the Executors, Trustees, as provided by the rules of the Court of Appeals of Kentucky, filed a petition for a rehearing on the 17 day of March, 1943, and thereafter on the 20 day of April, 1943, Petitioners filed response to the executors' petition for rehearing, and the case was resubmitted.

Petitioners state the Court of Appeals of Kentucky did on June 25, 1943, withdraw the original opinion, and delivered an opinion, Ex. 5, by a Court divided four to three, affirming the judgment of the Pike Circuit Court; that Petitioners thereafter on the 23 day of July, 1943, filed Petition for rehearing, to which Petition for rehearing the Executors, Trustees, filed response. This petition for rehearing with the Executors' response was overruled by the Court on October 5, 1943, when the judgment became final, and the mandate of the Court of Appeals issued.

Petitioners state they in substance argued in briefs in the Court of Appeals of Kentucky, as they had done in the Pike Circuit Court.

Petitioners state the Court of Appeals of Kentucky failed to recognize the rights of Petitioners and other donees under the Acts of Congress of February 10, 1939, c. 2, 53 Statutes 1, under Revised Statutes, Section 3467, as amended May 10, 1934, under Article 6 of the United States Constitution, and under the 14th Amendment, Section 1, of the United States Constitution, and erroneously held

Petitioners were not discharged but the Executors, Trustees, were subrogated to the rights of the sovereign and had the right to collect from Petitioners a pro rata share of the Federal Estate taxes on account of the gifts by James Hatcher to them before his death, by the Executors adjusting their accounts with Petitioners; that by such holding Petitioners were deprived of their immunity from the payment of the tax in violation of the 14th Amendment, Section 1, of the United States Constitution, and there was erroneously imposed upon Petitioners an obligation to pay the $14,923.51, thereby depriving Petitioners of their property without due process of law in violation of the provisions of the 14th Amendment, Article 1, of the Constitution of the United States.

Petitioners state the Court of Appeals of Kentucky failed to recognize the Acts of Congress of February 10, 1939, c. 2, 53 Statutes 1, and Revised Statutes, Section 3467, as amended May 10, 1934, were the supreme law of the land, and erroneously imposed upon Petitioners an alleged rule of equity in Kentucky in its place.

Petitioners state there is no Kentucky Statute or rule of Equity, nor could there be one in a suit like this, without violating the Acts of Congress and the United States Constitution.

Petitioners state they contended, under the Federal Statutes, the issues in the pleadings and the provisions of James Hatcher's will that he had imposed by his will the obligation, as he had a right to do, upon his executors to pay all of his debts, Federal Estate taxes and other taxes from the estate in their hands; and the Court of Appeals erroneously failed to recognize the provisions of James Hatcher's will or to give effect to those provisions or to the Federal Statutes, and erroneously adjudged his will contained no provision directing

the payment of the Federal Estate taxes by his Executors.

Petitioners state Congress by Section 826(c) I. R. C., 26 U. S. C. A. 826(c), authorizing the executors to collect proportionate share of the Federal Estate tax from the beneficiary of life insurance includable in the gross estate, forbids further apportionment by the states against donees, as petitioners' property is not actually handled as a part of the estate by the executors; that Congress by this enactment has reserved to itself the right to determine what properties not passing through the hands of the executor shall pay a proportionate part of the Federal Estate tax. Congress having entered this field, the states are powerless to determine the impact of the tax in such cases.

Petitioners state they did on the 4 day of Dec., 1943, apply to the Court of Appeals of Kentucky for an appeal to the Supreme Court of the United States, which was allowed by an order duly entered.

This Petition for Certiorari is made pursuant to 28 U. S. C. A. 344b. This application is made within three months as allowed by 28 U. S. C. A., Section 350, for a writ to be directed to the Court of Appeals of Kentucky.

Petitioners state until this Court directly passes on the questions here presented, it will be doubtful and many controversies will arise in like or similar situations seriously affecting the proper administration of estates in the United States.

Wherefore Petitioners pray that a writ of certiorari be issued directing the Court of Appeals of Kentucky to certify a full and complete transcript of the record in this suit to the Supreme Court of the United States by a day certain, so this cause may be reviewed and finally determined; that the judgments and orders of the Court of Appeals

of Kentucky, and the Pike Circuit Court, Kentucky, be reversed; that Petitioners be granted all further full and proper relief.

JACK TRIMBLE,
JOB TRIMBLE, By His Next Friend
JACK TRIMBLE,
By J. SMITH HAYS,
Winchester, Ky.;
WILLIAM O. HAYS,
Winchester, Ky.,
Their Counsel.

Dated, Winchester, Kentucky, November 30, 1943.

EXHIBIT 1.

ACT OF CONGRESS OF FEBRUARY 10, 1939, c. 2, 53 STATUTES 1:

Section 810 I. R. C., 26 U. S. C. A. 810.
Rate of tax.
A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. * * *

Section 822b I. R. C., 26 U. S. C. A. 822b:

(b) Liability for payment. The tax imposed by this subchapter shall be paid by the executor to the collector. 53 Stat. 127.

Section 825a I. R. C., 26 U. S. C. A. 825a:

Discharge of executor from personal liability

(a) Application for discharge. If the executor makes written application to the Commissioner for determination of the amount of the tax and discharge from personal liability therefor, the Commissioner (as soon as possible, and in any event within one year after the making of such application, or, if the application is made before the return is filed, then within one year after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in sections 874 and 875) shall notify the executor of the amount of the tax. The executor, upon payment of the amount of which he is notified, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

Section 826b I. R. C., 26 U. S. C. A. 826b:

(b) Reimbursement out of estate. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall

be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Section 826c I. R. C., 26 U. S. C. A. 826c:

(c) Liability of life insurance beneficiaries. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. 53 Stat. 127.

Section 827b I. R. C., 26 U. S. C. A. 827b:

(b) Upon property of transferee. If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto

is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

TITLE 26—INTERNAL REVENUE

Chapter I—Bureau of Internal Revenue.

Subchapter B—Part 81

REGULATIONS 105

Sec. 81.75 Payment of tax; general.—The tax is due and must be paid within 15 months from the date of death unless an extension of time for payment thereof has been granted by the Commissioner. (See also section 81.79.) If the tax is due 15 months after the decedent's death, the due date is the day of the fifteenth calendar month after his death numerically corresponding to the day of the calendar month on which death occurred, except that, if there is no numerically corresponding day in such fifteenth month, the last day of such fifteenth month is the due date. For example, if the decedent died on August 31, 1939, the due date is November 30, 1940. • • • The collector will grant to the person paying the tax duplicate receipts, either of which will be sufficient evidence of such payment and entitle the executor to be credited with the amount by any court having jurisdiction to audit or settle his accounts.

• • • Until the tax, including any deficiency, is finally determined, the executor should reserve a sufficient portion of the estate to satisfy the liability.

Sec. 81.76 The executor shall pay the tax.—The Internal Revenue Code provides that the executor shall pay the tax. This duty applies to the entire tax, regardless of the fact that the gross estate consists in part of the property which will not come into his possession. If there is no duly qualified executor or administrator, all persons in actual or constructive possession of any property of the decedent are liable for and required to pay the tax to the extent of the value of such property. • • •

EXHIBIT 2.

UNITED STATES REVISED STATUTES, SECTION 3467.

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (R. S. sec. 3467, May 10, 1934, c. 277, sec. 518 (a) 48 Stat. 760.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 577

JACK TRIMBLE, AND JOE TRIMBLE, BY HIS NEXT FRIEND, JACK TRIMBLE.

Petitioners,

vs.

ZACH JUSTICE AND K. L. ARNOLD, EXECUTORS AND TRUSTEES, ET AL.

BRIEF FOR PETITIONERS.

MAY IT PLEASE THE COURT:

Opinions Below.

The judgment of the Pike Circuit Court is found R. Vol. I, page 120.

The first opinion of the Court of Appeals of Kentucky (whole court sitting), reversing the Pike Circuit Court in part, is not and will not be published in the reporters, and is found R. Vol. II, page 135.

The second opinion of the Court of Appeals of Kentucky, affirming the Pike Circuit Court judgment, is found in 173 S. W. (2) 985, Vol. 8 S. W. Advance Sheets dated October 19, 1943, and R. Vol. II, page 153. The minority dissenting opinion is in and at the end of the opinion which became final Oct. 5, 1943.

Jurisdiction.

A statement as to the jurisdiction appears in our petition for certiorari, and the exhibits attached.

Statement of the Case

1. James Hatcher died testate, a citizen of Pike County, Kentucky, September 29, 1939.

2. He died seized and possessed of a net estate of $352,939.29, R. Vol. I, p. 93.

3. His artificial, gross estate amounted to $486,801.33 when the value of gifts made in contemplation of death were included, R. Vol. I, p. 92.

4. The gross estate included the value of a gift by deed dated October 6, 1938, from James Hatcher to Jack Trimble and Joe Trimble jointly for life with remainder over (the whole title) of the James Hatcher residence and total property in Pikeville (R. Vol. I, p. 5) valued at $110,000.00

and it included gifts to the four Trimble girls and others by deeds to them for life with remainder over (the whole title) to property situated in Pikeville, and it included to them and others cash money delivered (R. Vol. I, p. 5), amounting to 63,176.00

in all $173,176.00

5. The tax on the estate after deductions (R. Vol. I, p. 94) amounted to $61,036.60
of which sum the executors have paid 14,981.10

leaving unpaid a balance of $46,055.50

The Federal Statute.

The Act of Congress of February 10, 1939, imposes the estate tax and provides for the assessment thereof. The act imposes the tax upon the estate passing at death, and provides the value of property transferred by gift before death, determined to be in contemplation of death, shall be included in the gross estate, reserving liens as security for the payment of the tax. To this point there is no controversy in this case.

The Federal statute provides the *executor* of the estate shall pay the tax, Title 26, U. S. C. A. 822(b). This means the tax must be paid from the estate passing at death to the executor, here $313,625.33 (R. Vol. I, p. 10). The statute provides when the executor has paid the tax the Commissioner shall issue to the executor duplicate receipts showing the payment of the tax, and enjoins all courts in auditing and settling the estate to give full faith and credit to the receipt, Title 26, U. S. C. A. 823.

It seems clear, when the tax is paid, as provided by the Federal statute, the executor and estate are relieved of further liability; that the executor has acquired no rights, but has only discharged a duty under the Federal statute. The discharge of the executor by the full payment of the tax discharges the debt due the Federal government and any liens or obligations of persons receiving gifts made by the decedent in contemplation of death. This has been the contention of the petitioners in the Pike Circuit Court in their pleadings and briefs in the Court of Appeals of Kentucky. The Pike Circuit Court and the Court of Appeals of Kentucky failed to recognize the effect of the discharge of the debt, and assume and adjudge erroneously the executors have acquired the right of subrogation from the sovereign to be reimbursed as executors or trustees from petitioners Jack and Joe Trimble in the

amount of $14,823.51 (R. Vol. I, p. 122). The language of the Federal statute means the executors and the estate are discharged from all liability on account of the Federal Estate tax when paid. This would be true if James Hatcher had died intestate.

James Hatcher's Will.

James Hatcher by his will (R. Vol. I, p. 16), duly published and probated, directed:

1. His trustees (executors) to pay his "debts." Petitioners claim this includes the Federal Estate tax. Taxes have been held to be debts, *Price* v. *U. S.*, 269 U. S. 492, 70 L. Ed. 373; *Hatch* v. *Morosco Holding Co., Inc.*, 61 Fed. 944; *Breete, et al.* v. *Hill, et al.*, 293 Ky. 526, 169 S. W. (2) 632; and in fact it is a debt arising by the imposition of the tax by the sovereign.

2. His trustees (executors) to borrow money and mortgage his trust estate therefor, for the purpose of paying "any United States Government, County and State, including income and inheritance, taxes levied or assessed against my said estate left by me by this will" (R. Vol. I, p. 29).

3. He further authorizes, empowers and directs that "out of the income from the trust property that the trustees pay all taxes on all of the property which I may own at the time of my death *whether the same be part of this trust estate or not*, also to pay all taxes on that property deeded by me to the Trimble Children and Hatcher Children on Ivy and Caney Creeks, alone, and this shall continue throughout the existence of the ten year trust only. The taxes mentioned in this paragraph shall be paid without charging any of the trust property."

4. The trustees shall at least twice a year for the first ten year period, on the first day of January and July

each year, after having paid all expenses, *taxes*, repairs and allowances as herein provided for; distribute equally the balance of the income from the trust estate.

5. He expressly provided "when and if the income of my trust estate, after the expiration and settlement of the first trust of ten years, ever becomes insufficient to pay the taxes" and other necessary expenses directed by the will during the thirty-five year trust period, and at the same time leave a substantial sum sufficient to be distributed, "that then and in that event * * * the beneficiaries may petition my trustee for discontinuance of the second thirty-five years trust under my will."

Every time taxes are mentioned the provisions repeatedly direct they are to be paid from his trust estate, which is the estate that passed to his executors and trustees at the moment of his death. The will expressly directs the taxes shall be paid by the executors and trustees, who are the same persons.

The Federal statute provides for the payment of the estate taxes by the executor to the Collector from the estate passing at death, Title 26, U. S. C. A., section 822 (b):

> "The tax imposed by this subchapter shall be paid by the executor to the Collector."

The Federal act allows the testator to provide where the burden of the Federal Estate tax shall rest, and petitioners contend James Hatcher availed himself of that privilege and placed the burden upon his trust estate. Petitioners earnestly insisted neither the Pike Circuit Court nor the Court of Appeals of Kentucky have any right to ignore the Federal Statute or his will or its provisions by erroneously construing in effect it authorized the executors to purchase from the Federal Government a portion of the estate taxes paid, and claim it as a debt against petitioners. It seems they have ignored petitioners' right of immunity from the

burden of debt, estate taxes, and by fiat placed upon the property given to Jack and Joe Trimble, a burden amounting to more than $14,000.

The Fourteenth Amendment of the United States Constitution provides no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Federal Estate tax law provides by section 826(c) the executor may collect a proportionate share of the tax from a beneficiary of life insurance which is included in the gross estate, and section 826(d) authorizes similar procedure against one receiving property subject to a power which is taxable. These sections deal with property which does not pass through the executor's hands. In the case at bar the gift property does not pass through the executors' hands. Congress has invaded this field and directed in what instances the beneficiary of property not passing through the hands of the executors shall contribute to the payment of the tax. Having entered this field and designated two classes that should pay, it follows all other classes in this field were intended to be free from the burden where there was sufficient estate in the hands of the executor to pay the tax. *Riggs* v. *Del Drago, et al.*, 63 S. Ct. 109, U. S. Advance Sheets. The judgments of the Courts of Kentucky compelling contribution from this class of donees, beneficiaries, is an invasion of the field entered by Congress, and it is beyond the power of the States to so act. Congress' entry into this field has preempted to the Congress the right to designate what classes in this field shall contribute. This confers jurisdiction upon this Court.

We submit this Court has jurisdiction of this appeal as the courts of Kentucky have misconstrued the Federal

statutes and violated the provisions of the Sixth Article and Fourteenth Amendment of the Constitution of the United States. We respectfully request a writ of certiorari be granted directed to the Court of Appeals and to the Pike Circuit Court, Kentucky.

Respectfully submitted,

J. Smith Hays,
William Hays,
Counsel for Petitioners.

Dated at Winchester, Kentucky, December 31, 1943.

(9769)